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THE HISTORY OF THE TREATMENT OF *CHOSES* IN ACTION BY THE COMMON LAW

"ALL personal things are either in possession or action. The law knows no *tertium quid* between the two." [1] It follows from this that the category of *choses* in action is in English law enormously wide, and that it can only be defined in very general terms. This is clear from the terms of the definition given by Channel, J., in *Torkington* v. *Magee*,[2] which is generally accepted as correct. It runs as follows: "'Chose in action' is a known legal expression used to describe all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession." In fact the list of *choses* in action known to English law includes a large number of things which differ widely from one another in their essential characteristics.[3] In its primary sense the term "*chose* in action" includes all rights which are enforceable by action — rights to debts of all kinds, and rights of action on a contract or a right to damages for its breach; rights

[1] Colonial Bank *v.* Whinney, 30 Ch. D. 261, 285 (1885), per Fry, L. J., whose dissenting judgment was upheld by the House of Lords, 11 A. C. 426 (1886).

[2] [1902] 2 K. B. 427, 430.

[3] For an exhaustive list see 4 HALSBURY, LAWS OF ENGLAND, 362–365; and for a discussion of the meaning of the term, and an account of the salient features of some of these varieties of *choses* in action, see the following articles in the LAW QUARTERLY REVIEW: H. W. Elphinstone, "What is a Chose in Action?" IX, 311; T. C. Williams, "Is a Right of Action in Tort a Chose in Action?" X, 143; Charles Sweet, "Choses in Action," X, 303; Spencer Brodhurst, "Is Copyright a Chose in Action?" XI, 64; T. C. Williams, "Property, Things in Action and Copyright," XI, 223; Charles Sweet, "Choses in Action," XI, 238.

arising by reason of the commission of tort or other wrong; and rights to recover the ownership or possession of property real or personal. It was extended to cover the documents, such as bonds, which evidenced or proved the existence of such rights of action. This led to the inclusion in this class of things of such instruments as bills, notes, cheques, shares in companies, stock in the public funds, bills of lading, and policies of insurance. But many of these documents were in effect documents of title to what was in substance an incorporeal right of property. Hence it was not difficult to include in this category things which were even more obviously property of an incorporeal type, such as patent rights and copyrights. Further accessions to this long list were made by the peculiar division of English law into common law and equity. Uses, trusts, and other equitable interests in property, though regarded by equity as conferring proprietary rights analogous to the rights recognised by law in hereditaments or in chattels, were regarded by the common law as being merely *choses* in action. The first question, therefore, which must be answered by any one who is writing a history of *choses* in action is the question how English law came to include this great mass of miscellaneous rights under this one head.

It is clear that the diversity of the things included under the category of *choses* in action must lead to a diversity in the legal incidents of various classes of *choses* in action. In fact their legal incidents do differ very widely; for, being different in themselves, they have necessarily been treated differently both by the courts and by the legislature. It is impossible to treat fully of the law of *choses* in action in general; and the various classes of *choses* in action are usually treated, not under this one general category, but under the separate branches of law to which they more properly belong. If we want to know the law, for instance, as to bills and notes, or shares, or copyright, or patents, we should not think of looking for it in a treatise on *choses* in action, but rather in books on mercantile law, company law, or in special treatises devoted to these particular things. Nevertheless the fact that all these things are classed as *choses* in action has had some influence on the shaping of their legal incidents. The original meaning of a *chose* in action — a right to be asserted by an action — has never been wholly lost sight of, and has had some influence even upon

those classes of *choses* in action which differ most widely from the original type. In spite of all differences, they are *choses* in action; and, when questions have arisen which have not been specially provided for by the legislature or otherwise, it has been necessary in order to solve them to have recourse to the original conception of a *chose* in action.[4] Here, as in other branches of the law, it has been necessary to seek authority on new problems from old cases, which were decided at a time when the law knew only the original type of *choses* in action. Hence the fact that all these things are classed as *choses* in action has left its mark upon the law; and, partly from this cause, partly by reason of the divergencies between the different classes of *choses* in action created from time to time by the courts and the legislature, the law upon many points connected with this subject was long, and still is, to some extent, confused, inconvenient, and uncertain. If, therefore, we would understand the history of the law upon this topic, we must consider the legal incidents of the original type of *choses* in action, and the modifications of those incidents made from time to time both in the original and the later types.

Therefore I shall deal firstly with the growth of the different varieties of *choses* in action; and, secondly, with the legal incidents of these different varieties.

THE GROWTH OF THE DIFFERENT VARIETIES OF *CHOSES* IN ACTION

In dealing with this subject it will be necessary to say something of the meaning which came to be attached to the phrase "*chose* in action" in the mediæval common law. We shall see that during that period two tendencies are observable. In the first place, the term "*chose* in action" gradually becomes a technical term, and in the second place its meaning tends to expand. When these mediæval developments have been dealt with we shall be in a position to trace the history of the still greater expansion of its meaning which took place in the course of the sixteenth, seventeenth, and eighteenth centuries, firstly and mainly, under the exigencies of the growth of commercial law; and secondly, by reason of the growth of a separate and definite system of equity.

[4] A very good illustration is afforded by the case of the Colonial Bank *v.* Whinney, 30 Ch. D. 261 (1885), 11 A. C. 426 (1886).

(1) *The Mediæval Development*

Bracton classes "actiones" amongst incorporeal things.[5] These "actiones," he tells us, are distinguishable from other incorporeal things, such as rents or advowsons, in that they are not recognized as completely the property of a deceased person. He cannot leave them by his will till they have been put in suit and judgment got upon them.[6] In fact these "actiones" differ widely from the other incorporeal things known to the mediæval common law; for these incorporeal things were regarded as property and assimilated to corporeal things.[7] The "realism" of the mediæval common law made for the multiplication of these incorporeal things, and classed under this head such things as annuities and corrodies, which in our modern law would be created by contract, and would therefore be classed as *choses* in action.[8] But mere rights of action were not touched by this realism. An action necessarily involves a definite plaintiff and a definite defendant. The right of action, therefore, is an essentially personal right of one person against another; and it is for this reason that they could not, as Bracton explained, be left by will. This conception of a right of action is reproduced by Fleta,[9] who classes an "actio" with such inalienable things as "res sacra," "res coronae," and a "liber homo";[10] and it became a recognised principle of the common law. Thus in Edward III's reign it is said that, though the lord of a villein may take an incorporeal thing like a rent which has been granted to the villein, and of which the villein is seised, "that which remains in action to the villein, as for instance the right under an obligation made to him or under a covenant of warranty, the lord cannot take." [11]

[5] "Incorporales vero res sunt, quae tangi non possunt, qualia sunt ea, quae in jure consistunt sicut haereditas, usus fructus, advocationes ecclesiarum, obligationes, et actiones, et hujus modi," f. 10b.

[6] "Item quaero, an testator legare possit actiones suas? Et verum est, quod non de debitis, quae in vita testatoris convicta non fuerunt nec recognita, sed hujusmodi actiones competunt haeredibus. Cum autem convicta sint et recognita, tunc sunt quasi in bonis testatoris, et competunt executoribus in foro ecclesiastico," ff. 61a, 61b; to the same effect f. 407b, where two cases are cited. Fleta repeats the same rule. 2 FLETA, 57, §§ 13, 14.

[7] 2 HOLDSWORTH, HISTORY OF ENGLISH LAW, 301; 3 *Ibid.*, 85–88.

[8] 2 *Ibid.*, 300–301; 3 *Ibid.*, 126–127.

[9] *Supra*, note 6.

[10] "Actio autem, res sacra, res coronae, liber homo, jurisdictio, pax, muri et portae civitatis, a nullo dari debent, ut valida sit donatio," 3 FLETA, 6, § 2.

[11] "Item dit fuit, que ceo que est en possession de villein come rent grante al villein de que il est seisi, le Seignior le puit happer, mes ceo que demurt en accion al villein

Thus it would seem that in its earliest sense the term "*choses in action*" meant, as Williams has said,[12] "things in respect of which a man had no actual possession or enjoyment, but a mere right enforceable by action."

It is obvious that the number and variety of these rights, and the manner in which they are developed by the law, must to a large extent depend on the law of procedure. The law of actions determines necessarily the conditions under which a right is asserted by action. Now in the mediæval common law the division of actions into real and personal was fundamental. It is to be expected, therefore, that rights which fell within the sphere of the one class of actions would be treated somewhat differently from rights which fell within the other class. This is to some extent the case. In fact it is probable that originally the term "*chose* in action" was applied to a right to bring a personal action. Bracton, following Azo, had laid it down that actions spring chiefly from obligations.[13] He thus associated the term "action" mainly with the personal action. Apparently this idea took root; for we can see from the case just cited from the Book of Assizes,[14] and from other cases in later Year Books,[15] that the phrase "*chose* in action" is used mainly in connection with rights arising under some one of the personal actions, such as debt, detinue, or trespass. It is not much before the sixteenth century that it is extended to cover rights arising under the real actions. It is then sometimes called a "*chose* in action real," a phrase which points to the fact that *chose* in action was regarded as primarily connected with the personal actions.[16] Even then its connection with the personal actions lived

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le Seignior n'avera pas. Come si obligation de dette soit fait al villein, ou covenant ou garrantie fait au villein, de ceo le Seignior n'avera nul avantage," 22 Ass., pl. 37 = BROOKE, ABRIDGMENT, *Chose in Action*, pl. 8.

[12] PERSONAL PROPERTY, 17 ed., 29.

[13] 2 HOLDSWORTH, HISTORY OF ENGLISH LAW, 219–220.

[14] *Supra*, note 11.

[15] See, *e. g.*, Y. BB. 9 HEN. VI, Hil., pl. 7; 19 HEN. VI, Mich., pl. 100; 39 HEN. VI, Mich., pl. 36; 5 EDW. IV, Mich., pl. 22 — a right of action for ravishment of ward which was in the nature of Trespass, HOLDSWORTH, HISTORY OF ENGLISH LAW, 13, n.s.

[16] Thus BROOKE, ABRIDGMENT, *Chose in Action*, pl. 14, abridging a case of 33 HEN. VIII, reports a case in which it was said that, "Si Abbe fuit disseisi de 4 acres de terre, le roy ne poct ceo graunt ouster devant entree fait per luy en ceo, pur ceo que est chose in accion reall, et nyent semble al chose in accion personall on mixt come dett garde et hujusmodi." Note that in Y. B. 2 HEN. VII, Mich., pl. 25, a grant by the crown of a right of re-entry and of a "chose qui gist en accion" are spoken of as

on in the definition given by the "Termes de la Ley" [17] and in Blount's Law Dictionary; [18] and signs of the old idea appear even in Blackstone.[19] Long before Blackstone's time, however, it was quite clear that it applied to rights to be asserted by real as well as by personal actions.[20] The result of this development was to merge certain ideas which had their roots in the treatment of rights arising from these two classes of actions, and so to give rise to that common-law conception of a *chose* in action which was so largely extended in later law. We must therefore examine the nature of the rights which arose within the spheres of the real and personal actions respectively, and the manner in which these rights came to be merged in the general conception of a *chose* in action.

Since the conception of a *chose* in action was primarily connected with a right arising from a personal action, I shall, in the first place, say something of the manner in which rights of this kind were regarded, and of the contribution made by ideas derived from this source. In the second place, I shall say something of the contribution made by ideas derived from rights arising within the sphere of the real actions. In the third place, I shall indicate the results of the combination of these two sets of ideas.

(*i*) *The Rights Arising from the Personal Actions.* — In the language of Roman law, personal actions were founded upon an *obligatio;* and an *obligatio* might arise either out of contract or tort. Britton, though he discarded much of Bracton's Roman law, repeats this *dictum*; [21] and though many of the personal actions of English law cannot be clearly grouped under these categories,[22]

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if they were separate things, though it would seem that the mention of a right of entry has suggested to Huse, C. J., the idea of a *chose* in action — their similarity is beginning to be perceived.

[17] "Things in action is when a man hath cause or may bring an action for some duty due to him, as an action of debt upon an obligation, annuity, or rent, action of covenant or ward, trespasse of goods taken away, beating or such like," cited 9 L. QUART. REV. 311.

[18] "Chose in action is a thing incorporeal, and only a right: as an annuity, obligation for debt, a covenant, voucher by warranty, and generally all causes of suit for any debt or duty, trespass or wrong, are to be accounted choses in action," cited *Ibid.*, 311–312.

[19] 2 COMM., 396–397.

[20] *Supra*, note 16. See the definitions given in SHEPPARD'S TOUCHSTONE, and JACOB'S LAW DICTIONARY, cited *infra*, notes 57, 58.

[21] I. 29. 2.

[22] 2 HOLDSWORTH, HISTORY OF ENGLISH LAW, 311–312.

the distinction was remembered, and necessarily emerged as the idea of contract came into greater prominence with the growth of the action of assumpsit. But it is clear that a personal action brought either on a contract or a tort is an essentially personal thing. The two parties have agreed, or the plaintiff has been wronged by the defendant. In both cases the cause of action arises from matters affecting these two persons and these only. On that account the common lawyers saw as clearly as the Roman lawyers that such rights of action were personal matters between these two persons. Therefore the assignment of such a right of action by the act of the two parties was unthinkable.[23] Indeed it was with difficulty, and only gradually and partially, that it was allowed to pass by operation of law to the representatives of a deceased person.[24] On the other hand, to allow the person entitled to bring the action to release his right to the person against whom it could be brought, involved no logical impossibility; for a personal right can as easily be dissolved as created by the act of the two persons concerned. Therefore just as a personal right, such as a debt, can be created by the agreement of the parties, so the debt and the right of action for it can be released by the converse agreement.[25]

But as the common law developed, it soon became apparent that certain actions in tort were in substance actions to recover property; and by means of developments both in the actions of detinue and of trespass, the proprietary rights of the owner out of

[23] This was first suggested by 2 SPENCE, EQUITABLE JURISDICTION, 850, who pointed out that this was the foundation of the doctrine adopted in every other state in Europe; and that this is the correct view has been proved by Sir F. POLLOCK, CONTRACTS, 5 ed., 206, and Appendix, note F.; up to that time lawyers had been content to accept the view put forward by Coke in Lampet's case, 10 Co. Rep., f. 48a (1613), that the reason for the rule was the discouragement of maintenance; we shall see that the desire to discourage maintenance and kindred offences has had a very important influence on the law as to the assignability of *choses* in action, *infra*, 1016 *seqq.*; but, though it was a contributory cause to the continuance of their non-assignability, and to other points connected with the law relating to them, it cannot be regarded as being the sole or the earliest cause.

[24] 3 HOLDSWORTH, HISTORY OF ENGLISH LAW, 458.

[25] Litt., §§ 508, 511, 512. In commenting on § 512, which deals with the release of a debt before the time of payment has arrived, Coke says, Co. LITT., 292b, "For that the Debt is a thing consisting merely in action, and therefore, albeit no action lieth for the debt, because it is *debitum in praesenti quam vis sit solvendum in futuro;* yet because the right of action is in him, the release of all actions is a discharge of the debt itself."

possession were coming to be better protected. Thus it was recognised in the sixteenth century that a bailor who had bailed his property had the property in reversion.[26] It was also recognised that an owner of goods might retake them from a trespasser,[27] and that a mere release of rights of action to the wrongdoer would not bar his right of entry.[28] We might therefore have expected that the rights of the owner out of possession would come to be recognised as something more than a mere personal *chose* in action; and that they would develop into assignable rights of property. And, in fact, there are some hints that the law was tending to develop in this direction. Thus in 1431 [29] Paston, J., said, "if I bail to you a deed to rebail to me, and then I grant the same deed to B, I shall not have writ of detinue against you after this grant, but the said B will have writ of detinue." [30] So too in 1491 the validity of a gift by a bailor seems to be maintained by Vavisor; [31] but it was distinctly denied by Brian, C. J., who held that such rights could not be given.[32] But Brian's view did not wholly prevail. The later cases show that modifications were being made. In 1561 it was held that where a woman had bailed property to another and married, her husband could release the right to the property to the bailee.[33] This clearly shows that the bailor's proprietary right was something more than a mere *chose* in action. It was sufficiently proprietary in its character to pass to the husband on marriage. Similarly, it was the fact that a contract of sale gave right to get possession which could be asserted by action of detinue, which is the origin of the rule that a sale passes the property in the goods without delivery.[34] In the case of a sale, therefore, it was recognised that a right to the property sold which

[26] 1 BROOKE, ABRIDGMENT, *Propertie et Proprietate Probanda*, pl. 33 = Y. B. 22 EDW. IV, Pasch., pl. 29, on which the question was discussed whether cattle let by the lessor for a term could be taken for his debt.

[27] 3 HOLDSWORTH, HISTORY OF ENGLISH LAW, 244–245; Chapman *v.* Thumblethorp, Cro. Eliza. 329 (1594).

[28] Litt., § 498.

[29] Y. B. 9 HEN. VI, Hil., pl. 17.

[30] "Si jeo baille a vous un fait a moy rebailler, et puis jeo grant meme le fait a B., jeo n'aurai bref de Detinue vers vous apres cel grant, mes le dit B aura bref de detinue."

[31] Y. B. 6 HEN. VII, Mich., pl. 4 (pp. 8–9).

[32] "S'il n'ad forsque droit cel don est void; car on ne poit don son droit." *Ibid.*, p. 9.

[33] DAME AUDLEY'S CASE, MOORE, 25.

[34] 3 HOLDSWORTH, HISTORY OF ENGLISH LAW, 282–284.

could be thus asserted was much more than an unassignable *chose* in action. Thus it was held in Sir Thomas Palmer's case [35] that the grantee of six hundred cords of wood, to be taken by the assignment of the grantor, had an assignable interest in the wood.[36] The ownership of the wood had passed to the grantee, and this ownership — this right to possession — was regarded not as a mere right of action to get possession, but as assignable property.

It would seem, therefore, that there was a tendency to think that rights to chattels, though they could only be asserted by a personal action, were something more than mere unassignable *choses* in action. But this tendency did not develop; and, though the law has come to be settled in this way, it has not, as we shall see,[37] been so settled till quite modern times. This was due mainly to two causes. Firstly, it was due to the peculiar development of the personal actions for the recovery of property. Detinue was superseded by the action on the case founded on a trover and a conversion; and this was an action which sounded in tort. It was originally not regarded as being of so proprietary a nature as detinue. Therefore such a right of action was necessarily purely personal and, consequently, a mere *chose* in action. Thus it was held in 1664 in the case of *Powes* v. *Marshall*,[38] by Twisden and Windham, JJ.,[39] that, though a husband could alone bring the proprietary action of detinue for things which belonged to his wife before marriage, both must join if an action of trover was brought, because such an action was founded solely on the tort of converting the things. According to this view, the right which was asserted in such an action, though in substance a right of property, was, on account of the character of the action, regarded as a mere *chose* in action. On the other hand, by this date the proprietary aspect of trover was beginning to develop. Hyde, C. J., and Keeling, J., dissented from the view of Twisden and Windham, JJ., holding that the husband could sue alone; and in 1674 in the case of *Blackborn* v.

[35] 5 Co. Rep. 24b (1601).

[36] "That Cornford had an interest which he might assign over, and not a thing in action or a possibility only." *Ibid.*, 25a.

[37] *Infra*, 1017–1018.

[38] Sid. 172.

[39] "Est diversity inter actions queux affirme property come replevin detinue, etc., car ceux doint estre port in le nosme del baron sole, quia le property est affirme, et actions queux disaffirme property, come trespass, trover, etc., car ceux doint estre port in ambideux lour nosmes, quia sont found sur le tort fait devant le coverture."

Greaves [40] it was held that such an action might be brought either by the husband alone or by husband and wife together. It would seem, therefore, that the objection arising from the form of the action was got over, and that the rights of the owner out of possession were recognised as something more than a mere *chose* in action. But this development was delayed by the second of the two causes mentioned above. Secondly, another very powerful reason, which strengthened the tendency to adhere to the old view that the right of the owner out of possession is a mere *chose* in action, is to be found in a development which was taking place in the law as to the rights arising in the sphere of the real actions.

(*ii*) *The Rights Arising in the Sphere of the Real Actions.* — The rights arising in the sphere of the real actions were rights to get seisin which were enforceable either by entry or action. The omission to pass any statutes of limitation in the Middle Ages enormously extended the time during which a disseised owner had a right of entry; the legislature extended the number of cases in which such an owner had a right of entry; and the result of these two causes was practically to limit the cases in which a disseised owner had only a right of action to the cases when there had been a descent cast or a discontinuance.[41] This meant that the owner's right to get possession was better protected and more fully recognised, so that, as in the case of chattels, this right to get possession might easily have developed into something more than a mere *chose* in action. But all development in this direction was stopped by the extension which both the legislature and the courts gave to the offences of maintenance and champerty.

It is clear that all legal systems which permit owners out of possession to assign their rights to recover property and their rights under an *obligatio* must recognise that this privilege may be abused. They must recognise that these rights may be assigned to persons who, by their power or influence, may be in a position to put a greater and perhaps an illegitimate pressure on the possessor or on the person who owes the duty and that very dubious rights may be assigned to persons in such a position merely because they are dubious. When, in later Roman law, assignments of *choses* in action were permitted, it was found necessary to enact that the

[40] 2 Lev. 107, and note, p. 108.

[41] 2 HOLDSWORTH, HISTORY OF ENGLISH LAW, 497.

purchaser should not be able to recover from the person liable more than he had paid,[42] and to prohibit assignments to persons more powerful than the assignor;[43] and in 1912 Farwell, L. J., pointed out that a free permission to assign rights of action in tort might lead to blackmailing.[44] The risk, then, of maintenance is a risk which all legal systems must face if they permit the assignment of *choses* in action.

In England in the Middle Ages the disorderly state of the country, the technicality of the common-law procedure, the expense of legal proceedings, and the ease with which jurors, sheriffs, and other ministers of justice could be corrupted or intimidated, made maintenance and kindred offences so crying an evil that it was necessary to prohibit sternly anything which could in the smallest degree foster them.[45] Therefore the courts in the Middle Ages stretched the offence of maintenance to its utmost limits; and statutes repeatedly prohibited all practices which could favour it.[46] Thus it happened that all trafficking in rights of entry upon land were sternly forbidden; and as late as 1540[47] a statute was passed which sharpened the edge of the mediæval legislation. On the other hand, a permission to release a right of entry to the tenant in possession tends to stop litigation and therefore to discourage maintenance. Such a release was therefore permitted. But so serious and so dangerous was the offence of maintenance all through the Middle Ages and until the Tudors had created a strong and efficient government, so great was the risk that any permission to

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[42] CODE 4. 35. 22.

[43] CODE 2. 13. 2. These enactments are cited by MOYLE, JUSTINIAN, 5 ed., 484. At page 482, Dr. Moyle says that while the English lawyers based their opposition to the assignment of *choses* in action on the evils of maintenance, the Romans based it on the personal character of the relations created by an *obligatio*; we have seen that this is not wholly true (*supra*, 1002), but it is true that, owing to the disorderly state of the country in the fifteenth and early sixteenth centuries, the evils of maintenance were more acutely felt, and the need of suppressing it bulked larger than in Roman law.

[44] "I think it would be exceedingly bad policy to allow a person to sell rights of action for tort which he did not care to run the risk of enforcing himself; as for example to allow a liquidator to put such rights up for auction and sell them to some one who might buy for a small sum of money the chance of recovering a larger sum or possibly of blackmailing." Defries *v.* Milne, [1913] 1 Ch. 98, 110–111.

[45] 1 HOLDSWORTH, HISTORY OF ENGLISH LAW, 159; 2 *Ibid.*, 348.

[46] 2 HOLDSWORTH, HISTORY OF ENGLISH LAW, 376; 35 L. QUART. REV. 59 *seq.*

[47] 32 HEN. VIII, c. 9.

assign rights of entry would lead to acts of maintenance, that it came to be thought that rights of entry upon land were not assignable, because of the risk of encouraging this offence.[48]

In the case of rights of action, indeed, it was recognised that they were unassignable because, though rights to recover property, they were rights of *action*, and therefore essentially personal. For it was thought that as a right to bring a real action must be a right to sue a particular person in possession of the freehold, it was essentially a personal right, consisting only, as Coke said, "in privity."[49] Any chance that the law would recognise that a disseised owner's right to recover his ownership was merely incidental to that ownership, and that he would therefore be permitted to assign his right of ownership, and with it his right of action to recover it, was stopped by the fact that such a permission would obviously encourage maintenance. On the other hand, a release of a right of action to the tenant in possession was allowed for exactly the same reason as a release of a right of entry.[50]

Thus it happened that these rights arising in the sphere of the real actions exactly resembled the rights arising from the personal actions in that they could be released, but could not be assigned. No doubt both their capacity of being released and their incapability of being assigned were partly due to their personal character; but their incapability of assignment was due also and chiefly, in the case of many of these actions, to the dread of encouraging maintenance. The dread of encouraging maintenance bulked so large that the fact that their incapability of assignment was due to the personal character of many of these actions was overlooked; and

[48] "And first was observed the great wisdom and policy of the sages and founders of our law, who have provided, that no possibility, right, title, nor thing in action, shall be granted or assigned to strangers, for that would be the occasion of multiplying of contentions and suits, of great oppression of the people, and chiefly of terre-tenants, and the subversion of the due and equal execution of justice. . . . But all rights, titles, and actions may by wisdom and policy of the law be released to the terre tenant, for the same reason of his repose and quiet, and for avoiding of contentions and suits, and that every one may live in his vocation in peace and plenty." Lampet's case, 10 Co. Rep. 46b, 48a (1613).

[49] "Such right, for which the party had no remedy but by action only to recover the land, is a thing which consists only in privity, and which cannot escheat, nor be forfeited by the common law. . . . And it was observed by the justices, that by no act of attainder that ever hath been made, actions were given, but rights of entries, etc." Winchester's case, 3 Co. Rep. 1a, 2b (1583).

[50] Lampet's case, 10 Co. Rep. 46b, 48a (1613), cited *supra*, note 48.

thus it came to be thought that all rights of action were unassignable for this cause — a point of view which made for the permanence and rigidity of the rule. Indeed, as we shall now see, this dread of maintenance, which arose from the state of law and society in the Middle Ages, has had both a permanent and an unfortunate influence on this branch of the law.

(*iii*) *The Results of the Combination of the Ideas Derived from the Treatments of Rights of Action Personal and Real.* — Of the effect of the dread of encouraging maintenance upon the power to assign *choses* in action I shall speak in my next section, when I am dealing with the legal incidents of *choses* in action.[51] Here I wish to point out another of its effects — its contribution to the making of a common-law conception of a *chose* in action. It seems to me that it was the influence of this idea which led to the extension of the conception of a *chose* in action to cover rights to bring not only personal but real actions, and therefore to include in this conception not only rights which depended on a contractual or delictual obligation, but also rights which depended upon a claim to the ownership of property. The manner in which this influence was exercised was, it seems to me, somewhat as follows: It is quite obvious that a right of action which is based on a contractual or delictual obligation is entirely personal in its character, and that on that account its release can, but its assignment cannot, logically be allowed. But this is not by any means so obvious where an owner out of possession is claiming from a possessor a thing in his possession by virtue of his right as owner to get possession. There is, as we have seen, no logical reason why such ownership and, with the ownership, the right of action should not be assigned; and in fact there are some signs that the lawyers of the fifteenth and sixteenth centuries might, on this ground, have allowed a modified right to assign the ownership of chattels personal, and, with the ownership, the rights of action.[52] But the dread of encouraging maintenance had led to the permission to release and to the refusal to permit any assignment of rights of entry and action to land. Thus it happened that rights of action, whether real or personal, had these two important features in common — both could be released, and neither could be assigned. Naturally lawyers did not stop to analyse the reasons why they could be released and

[51] *Infra*, 1016 *seqq.*

[52] *Supra*, 1003–1005.

could not be assigned. They looked merely at these two resemblances, and more especially at the fact that both were unassignable; and, as the reason for the non-assignability of rights of entry upon and action for land was only too obvious, they naturally adopted the idea that this reason was applicable to all these rights of action.[53] When this had happened it was inevitable that all these rights of action should be grouped together under the comprehensive title "*choses* in action."

Thus we arrive at the original common-law conception of a *chose* in action. We have seen that in 1486 the similarity of a right of entry to a "chose qui gist en accion" is beginning to be perceived, and that rights of entry or rights to bring a real action were called "*choses* in action real" in 1542.[54] The fact that all these *choses* in action were treated by the law in a similar manner, coupled with the disuse of the real actions, soon obliterated the distinction between real and personal *choses* in action; and so the common law widened its conception of a *chose* in action, and came to include in it all rights of action, whether enforceable by real or by personal actions. According to the definition given by the "Termes de la Ley," it includes more than rights to bring personal actions;[55] and, though the older idea which connected it with the personal actions lived on,[56] it is clear both from "Sheppard's Touchstone"[57] and Jacob's Law Dictionary[58] that it included rights to be

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[53] Mr. Sweet has pointed out, 10 L. QUART. REV. 308, 309–310, that "the fulminations against maintenance and champerty, which abound in the old books, were directed not so much against the maintenance of actions of debt and the like, as against abuses arising from the practice of buying up rights of entry and rights of action for the recovery of land"; and that "one kind of maintenance was distinguished by the old writers as 'maintenance in the countrey,' *manutentio ruralis*, being confined to claims in respect of land, and the very name of champerty shows that the offence had a similar origin;" but the same idea was applied to chattels certainly as early as 1431. Y. B. 9 HEN. VI, Hil., pl. 17. And see POLLOCK, CONTRACTS, 5 ed., App. 700, for a clear account of this case.

[54] *Supra*, note 16. [55] *Supra*, note 17. [56] *Supra*, 1002.

[57] "Things in action, as a right or title of action that doth only depend in action, and things of that nature, as rights and titles of entry to any real or personal thing," page 231, cited 10 L. QUART. REV. 307.

[58] "Generally all causes of suit for any debt, duty or wrong are to be accounted *choses in action*. . . . A person disseises me of land, or takes away my goods; my right or title of entry into the lands, or action and suit for it, and so for the goods, is a *chose in action:* So a debt on an obligation, and power and right of action to sue for the same," *sub. voc. Chose*, 3 ed. (1736).

asserted both by real and personal actions. Thus all memory that there had ever been a distinction between the rights enforceable in the spheres of the real and personal actions, and the possibilities involved in it, disappeared.

(2) *The Later Developments*

It was this mediæval development of the conception of a *chose* in action which paved the way for further extensions in later law. Already at the close of the Middle Ages we can see that the way is being prepared for these extensions. In fact in the late fifteenth and in the sixteenth centuries we can detect three distinct lines upon one or other of which the extensions made in later law will proceed by way of analogy, sometimes more and sometimes less close.

(i) During the sixteenth century *choses* in action were extended from a right to bring an action to the documents which were necessary evidence of such a right. Thus in 1535 a bond was said to be a *chose* in action; [59] and in 1584 in Calye's case [60] it was said that charters and evidences concerning freehold or inheritance, obligations, and other deeds and specialities, all came under this head. When the law had reached this point it was inevitable that the many new documents which the growth of the commercial jurisdiction of the common-law courts was bringing to the notice of the common lawyers should be classed in this category. Thus during the seventeenth, eighteenth, and nineteenth centuries such documents as negotiable instruments,[61] stock,[62] shares,[62] policies of insurance,[63] and bills of lading [64] were declared to be *choses* in action; and this classification was sometimes recognised by the legislature when it provided that, though *choses* in action, their legal incidents should be in some respects varied.[65]

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[59] 1 Dyer, f. 5b.

[60] "The said words . . . do not of their proper nature extend to charters and evidences concerning freehold or inheritance, or obligations, or other deeds or specialties, being things in action." 8 Co. Rep. 32a, 33a.

[61] Master *v.* Miller, 4 T. R. 320, 344 (1791), per Grose, J.

[62] 10 L. QUART. REV. 311–312.

[63] *Re* Moore, *ex parte* Ibbetson, 8 Ch. D. 519 (1878).

[64] Caldwell *v.* Ball, 1 T. R. 205, 216 (1786).

[65] 4 WILLIAM AND MARY, c. 3; 9 & 10 WILLIAM III, c. 44 — stock in the funds, cited 10 L. QUART. REV. 312; for the stock and shares of other companies see *infra*, 1027.

(ii) We have seen that the large class of incorporeal things which were recognised by the mediæval common law were treated as far as possible like corporeal hereditaments.[66] Thus they were taken out of the category of *choses* in action. But we have seen that certain of these incorporeal things, such as annuities and corrodies, had always approximated to personal obligations to pay or perform.[67] It is not surprising, therefore, that when, in the fifteenth century, the conception of a *chose* in action was being extended to cover all sorts of rights which could be asserted by action, some should have thought that annuities should be included in this category. In 1482 Brian, C. J., said that an annuity was merely a "chose personal" which could not be granted;[68] and, if this opinion had prevailed there can be little doubt but that it would have been classed under the growing number of *choses* in action. But this view did not prevail. In the same case Catesby pointed out that an annuity was recoverable, not by writ of debt, but by a writ of annuity, and that if granted to a man and his heirs, it would descend to the grantee's heirs.[69] He argued, therefore, that, though the grantee had no tangible thing, but only a right enforceable by action, that right, like the right to a rent, was a thing which could be assigned;[70] and, though the view of Brian, C. J., is taken by

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[66] *Supra*, note 8.

[67] *Ibid.*

[68] "C'est annuity ne puit estre grant, car c'est n'est que chose personel . . . et ou annuity est grant en fee, si rien soit discend a heir le grantor, l'issue ne serra charge, nient plus que serra per obligation fait per son pere, et ou est dit qu'il est enheritance et discende, et l'heir avera accion de ceo, jeo grant bien, mes quel accion est ceo? certes nul accion mes bref d'Annuity, que n'est que personel, car accion ancestral jamais il n'avera, ou si le pier fuit disseisi de ceo, il n'avera bref d'Entre sur disseisin, ne aura accion real, per que il est en nature de accion personal, est n'est semble a les cases de rent secke, car de ce home avera accion real . . . Et a ce que est dit, qu'il ad enheritance en l'annuity, et per ce il puit grant, Sir, home avera fee simple, et uncore il ne poit grant ce, come si jeo grant a un et ses heirs d'estre mon kerver, il est office de trust que il ne grauntera ouster." Y. B. 21 EDW. IV, Hil., pl. 38 (p. 84).

[69] "Et a ce que est dit que le bref (of annuity) est en nature de Det, pur ce que le bref est en le *debet*, ils ne sont semblables, car en Annuity home nemy puit aver son ley, mes en det auterment et les executors averont l'accion de Det sur obligation, et nemy le heir, car tiel action de Det ne puit descender, mes l'Annuity puit discender, et l'heir avera bref d'Annuity, quel prove qu'el n'est personnel, ne semblable a action de Det." *Ibid.*, p. 84.

[70] "Mesme le ley est ou il fuit rent secke devant, issint icy, c'est annuity est real, et coment que il (n') avera action, uncore le grant est bon. Et Sir moy semble qu'il avera bref d'Annuity." *Ibid.*

Perkins,[71] it is Catesby's view which has prevailed.[72] On the other hand, there was a tendency to regard any incorporeal thing which could not be assigned as a *chose* in action. The influence of this incident of non-assignability was by no means exhausted when it had led to the inclusion under one category of rights arising within the sphere both of the real and the personal actions. Thus an advowson was clearly an incorporeal hereditament. But in 1570 it was said that if the church was void, so that no grant of the next presentation of the church could be made, the right to present was merely a *chose* in action.[73] Coke, however, recognised that, though from the point of view of non-assignability it resembled a *chose* in action, it was "not merely a chose in action," because it had certain of the other qualities of tangible property.[74]

It is clear, however, that there was a tendency in the sixteenth century to regard any intangible right which was not clearly an incorporeal hereditament, and any non-assignable right, even though it was only temporarily non-assignable, as a *chose* in action. It seems to me that it was due partly to this tendency that such incorporeal property as patents and copyrights came in the eighteenth century to be classed as *choses* in action. Probably if these forms of property had arisen at an earlier stage in the history of the law they would have been regarded as franchises, and therefore as incorporeal hereditaments; for it is obvious that, in the case of the patent, and of that species of copyright which depended upon royal grant, the analogy to the franchise is close;[75] and that, when

[71] PERKINS' PROFITABLE BOOK, § 101.

[72] Baker *v.* Brook, Dyer, 65a (1550); Gerrard *v.* Boden, Hetley, 80 (1628). *Cf.* Maund's case, 7 Co. Rep. 28b (1601).

[73] "By Harper, Weston, and Dyer holden, That the grant of the present avoidance is void, because it is a mere personal thing annexed to the person of him who was patron in expectancy at the time of the vacancy; and also a thing in right, power, and authority, and also a *chose in action*, and in effect the fruit and execution of the advowson, and not any advowson." Stephens *v.* Wall, Dyer, 282b, 283a.

[74] "*Note*, if the church becometh void, albeit the present avoidance be not by law grantable over, yet may the lord of the villein present in his own name, and thereby gain the inheritance of the advowson to him and his heirs: for albeit it be not grantable over, yet it is not merely a chose in action; for if a feme covert be seised of an advowson, and the church becometh void, and the wife dieth, the husband shall present to the advowson: but otherwise it is of a bond made to the wife because that is merely in action." Co. Litt. 120a.

[75] The origin and growth of copyright will be dealt with in a paper which will shortly appear in the YALE L. J. For patent rights see 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, 117.

copyright had come to depend upon statute, it was still a privilege which was more like a mediæval franchise than a *chose* in action. But when these things had become recognised as objects of property, franchises were an obsolete and decadent class of property. The time had long passed when the law as to the classes of property protected by the real actions was the most highly developed branch of the law, when the easiest way to protect any right was to treat it as a thing and to give it the protection of an action which was modelled on the pattern of the real actions.[76] The law of contract was in the ascendant; and as the concept *chose* in action had been extended so as to include such documents of title to property as bills of lading and stocks and shares, it was natural that such property as patents and copyrights should be brought within it.[77] They were clearly not *choses* in possession, and they were analogous to other things classed as *choses* in action. Thus the way was prepared for the generalization that all personal property known to English law must consist either of *choses* in possession or *choses* in action.[78] But we shall see that, just as Coke in the sixteenth century was obliged to point out that certain of these *choses* in action were "not merely choses in action," [79] so in our modern law the incidents of many of these things classed as *choses* in action show that they are in substance property of an incorporeal kind.[80] Their inclusion in the class of *choses* in action can only be explained by the history of the manner in which the concept *chose* in action has been gradually and continuously extended by analogy, until it has come to include so many heterogeneous rights that it is a work of some difficulty to discover any resemblance between certain classes of them.

(iii) In the Middle Ages the interest of the *cestui que use* was at first analogous to a *chose* in action; for the trust was originally enforceable only against the feoffee to uses, and not against his heir or assignee.[81] *Cestui que use* had, as Coke said, "neither *jus*

[76] 2 HOLDSWORTH, HISTORY OF ENGLISH LAW, 300–301.

[77] For a discussion as to whether copyright is a *chose* in action, see 11 L. QUART. REV. 64, 223, 238.

[78] *Supra*, note 1.

[79] *Supra*, note 74.

[80] *Supra*, note 25; *infra*, 1027.

[81] Though not called a *chose* in action by the older authorities, and even distinguished from a trust which was called a *chose* in action by Coke, *infra*, note 84, its legal incidents before it had been developed by the Chancery and regulated by the

in re nor *jus ad rem*, but only a confidence and trust, for which he had no remedy by the common law, but for breach of trust his remedy was only by subpœna in Chancery."[82] But the interest of the *cestui que use* had been so shaped not only by the Chancery, but also by the legislature, that his interest had become something very much more than a mere *chose* in action; and this fact was recognised in the sixteenth century.[83] But in the sixteenth century the conception of a *chose* in action was beginning to expand. Therefore the common lawyers of that period had no hesitation in asserting that at common law an equitable trust, consisted only "in privity," was unassignable on account of the risk of encouraging maintenance, and was therefore in the nature of a *chose* in action.[84] It is for this reason that many different kinds of equitable interests are classed as *choses* in action.[85] But inasmuch as the incidents of such interests are shaped by equity, the fact that they are at law classed as *choses* in action has had very little influence on their development.

Such, then, was the manner in which the concept *chose* in action came to include so many diverse rights. We must now consider the evolution of the law as to the legal incidents of these various classes of rights.

THE LEGAL INCIDENTS OF *CHOSES* IN ACTION

The leading characteristics of *choses* in action were ascertained in the days when they were really rights enforceable either by real or personal actions; and these characteristics were either logical deductions from the nature of such rights, or were ascertained by the need to settle the relation of these rights to other branches of

legislature justifies Holmes's statement, COMMON LAW, 407, that it was in substance a *chose* in action.

[82] Co. Litt. 272b.

[83] See note 84, *infra*.

[84] "It was resolved by all the Justices, that admitting that Sir Thomas Heneage had a trust, yet could not he assign the same over to the plaintiff, because it was a matter in privity between them, and was in nature of a chose in action, for he had no power of the land, but only to seek remedy by Subpœna and not like to cestui que use, for thereof there should be *possessio fratris*, and he should be sworn on juries in respect of the use, and he had power over the land by the statute of 1 R. 3 Cap. and if a bare trust and confidence might be assigned over, great inconvenience might thereof follow by granting of the same to great men, etc." COKE, FOURTH INSTIT., 85.

[85] 4 HALSBURY, LAWS OF ENGLAND, 364.

the law. The main characteristic which follows from the nature of these rights is their non-assignability; and this has always been so prominent a characteristic of *choses* in action that the lawyers were inclined to place any right permanently or temporarily unassignable in the category of *choses* in action. Indeed, as we have seen, it was largely due to this reason that all rights of this kind, whether arising within the sphere of the real or the personal actions, were classed together in the single category of *choses* in action.[86] Other characteristics of these rights were ascertained by the need to settle their relations to the king's rights to the chattels of persons outlawed or attainted, to the criminal law, to the husband's rights in his wife's property, to the law as to taking goods in execution, and to the law of bankruptcy. I shall therefore in the first place say something of the history of the manner in which the legal incidents of the original class of *choses* in action were ascertained by the application of the rules relating to assignment, and by the need to settle their relations to these other branches of the law. In the second place, I shall give some illustrations of the manner in which the legal incidents of this original class of *choses* in action were modified when they were applied to the other varieties which subsequently emerged.

(1) *The Legal Incidents of the Original Class of Choses in Action*

Assignability. — We have seen that the non-assignability of *choses* in action which arose from either a contractual or a delictual obligation was a necessary and logical deduction from the nature of such a cause of action.[87] They were essentially personal rights — personal to the parties bound by the obligation. We have seen, too, that though this reasoning does not apply so forcibly to actions in which an owner out of possession is claiming to recover his property from another, the same result was produced by the application of the law of maintenance.[88] No assignment of rights of entry or action to land was allowed till 1845,[89] because to permit such assignment would tend to encourage maintenance. Naturally the principle of the statutes which had prohibited these assignments in the case of land was extended to actions to recover chattels. In

[86] *Supra*, 1009–1011.
[87] *Supra*, 1002.
[88] *Supra*, 1008.
[89] 8 & 9 VICT., c. 106.

fact so prominent a place did this reason for prohibiting the assignment of *choses* in action take in English law that it came to be regarded as the only reason for the non-assignability of *choses* in action.

This then was the principle from which the common law started. The main interest of its later history consists in the manner in which it has been gradually and partially modified. In relating this history it will be necessary to deal separately with (i) rights of action of a proprietary character; (ii) rights of action for breach of contract; and, (iii) rights of action of a purely delictual kind.

(i) Rights of action of a proprietary kind can be quickly disposed of. The statutes which prevented any assignment of rights of entry upon or action for land [90] were so definite that no gradual modification of the rule was possible; and it was not, as we have seen, till 1845 that the legislature permitted their assignment. In the case of chattels both the fact that the action of trover, in which such rights had generally come to be asserted, was of a delictual character, and the objection based on the fear of maintenance, prevented the development of any of those modifications of the strict rule of which we can see some signs in the sixteenth century; [91] and no statute, like the statute of 1845 in the case of land,[92] has expressly enabled the owner out of possession to alienate.

But it is clear that at the beginning of the eighteenth century and during the nineteenth century the tendency towards some modification of the strict rule was again beginning to prevail. In 1705 Holt, C. J., seemed to assume that a bailor could make a gift of his right to the goods, though the donee might not be able to sue the bailee in detinue, since by such gift the bailee's special property was not transferred.[93] But as late as 1844, in the case of *Franklin* v. *Neate*,[94] Parke, B., held that the pawnor of a chattel had only an unassignable *chose* in action. This decision was, however, reversed, and it was held that the pawnor could, subject to

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[90] See especially 32 HEN. VIII, c. 9.

[91] *Supra*, 1008.

[92] 8 & 9 VICT., c. 106, § 6.

[93] "If *A.* bail goods to *C.*, and after give his whole right in them to *B.*, *B.* cannot maintain *detinue* for them against *C.* because the *special property* that C. acquires by *the bailment*, is not thereby transferred to B." Rich *v.* Aldred, 6 Mod. 216. Holt clearly supposes the gift is good; he does not say, as Brian, C. J., said (*supra*, note 32) that the gift is void.

[94] 13 M. & W. 481.

the rights of the pawnee, sell his rights to a buyer; and that if the buyer tendered to the pawnee the amount due, and the pawnee refused to deliver, the buyer could maintain trover. At the present day the right of the owner out of possession to alienate his property was assumed in the case of *Cohen* v. *Mitchell*,[95] and was recognised in the case of *Dawson* v. *Great Northern and City Railway*.[96] And the courts have even gone further. They have held in *Whiteley* v. *Hilt*,[97] that a hirer under a hire purchase agreement may assign not only the possession of chattels hired, but also his rights under the agreement to acquire the ownership; and in *Glegg* v. *Bromley* [98] that, though a cause of action arising from tort is unassignable, the fruits of such an action, if and when recovered, are assignable. Thus at the present day the owner of chattels in the possession of another is as well able to assign his rights as the owner of land.

(ii) Rights of action of a contractual kind must always be of a purely personal nature. Therefore in early law the prohibition against their assignment was absolute.[99] It is true that in most cases they became transmissible on death at a comparatively early date.[100] It is true also that it was recognised that certain covenants might be so annexed to a particular estate in the land

[95] 25 Q. B. D. 262 (1890.)

[96] "An assignment of a mere right of litigation is bad: *Prosser* v. *Edmonds;* but an assignment of property is valid, even although that property may be incapable of being recovered with one litigation. See Dickinson *v.* Burrell," [1905] 1 K. B. 260, 271. Both the cases here cited were cases of equitable interests; in Prosser *v.* Edmonds, 1 Y. & C. 481, 499 (1835), A, being entitled to certain property under his father's will, assigned the whole (except a certain reversionary interest) to B, his father's executor; but A could have set aside the assignment on the ground of fraud. Afterwards A assigned all his interest under his father's will to C. It was held that C could not make use of A's rights to set aside the assignment to B on the ground of fraud, as such a *chose* in action was unassignable. In Dickinson *v.* Burrell, L. R. 1 Eq. 337 (1866), A conveyed real estate to B, but the conveyance was liable to be set aside on equitable grounds. He then made a voluntary settlement of the same property. It was held that the beneficiaries under the later settlement could set aside the conveyance to B, on the ground that this was a right incident to the property conveyed to them, and not, as in Prosser *v.* Edmonds, the conveyance of a mere right to litigate. It would seem to follow from the two cases already cited in the text that if an owner out of possession conveyed his right to X, and the possessor wrongfully refused to hand it over to X, X could bring an action of conversion in the name of the owner if not in his own name.

[97] [1918] 2 K. B. 808.

[98] [1912] 3 K. B. 474.

[99] *Supra*, 1000.

[100] 3 HOLDSWORTH, HISTORY OF ENGLISH LAW, 458.

that successive holders of that estate could enforce them.[101] But to the end the common law never in theory departed from its rule that rights of a contractual kind could not be assigned by an act of the parties to the contract.[102] As early, however, as the beginning of the fourteenth century the merchants had begun to circumvent this prohibition. If the right was to an ascertained sum of money, that is if it was a debt, the creditor could appoint the assignee his attorney, to sue for the debt, and could stipulate that he should keep the amount realised; and in the fifteenth century this method of assigning a debt was recognised as valid by the common-law courts.[103] Thus, as in Roman law,[104] the assignee sued for the debt in the assignor's name and as his attorney.

But upon this device the influence of the idea that the assignment of any *chose* in action was void because it tended to encourage maintenance exercised a retarding influence. Cases in which this device was employed were often attacked on this ground.[105] But, the fact that the person maintaining had some sort of common interest with the person maintained of a legal or moral kind, was recognised as a good defence to an action for maintenance. Therefore, if the assignment of a debt by way of the appointment of the assignee as the assignor's attorney was attacked on this ground, it was necessary to show that the assignee and the assignor had some sort of common interest. It was held that a sufficient common interest existed if it could be proved that the assignor owed money to the assignee, and that the assignment was made in satisfaction of the debt.[106] On the other hand, a common interest could not

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[101] 3 HOLDSWORTH, HISTORY OF ENGLISH LAW, 130–135.

[102] Thus in 1867 Willes, J., said in the case of Gerard *v.* Lewis, L. R. 2 C. P. 305, 309, "the rule against assigning a chose in action stood in the way of an actual transfer of the debt." *Cf.* Ames, "Disseisin of Chattels," 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, 584.

[103] Y. B. 34 HEN. VI, Mich., pl. 15, per Wangford *arg.*, and Prisot, C. J.; in Y. B. 15 HEN. VII, Hil., pl. 3, it is said that, "Si on soit endette a moy et livre a moy un obligation en satisfaction de cest det, en que un auter est tenu a luy, jeo suirai action en le nom cesty que fuit endette a moy"; BROOKE, ABRIDGMENT, *Chose in Action*, pl. 3, in abridging this case, says, "Et sic vide que chose in accion poet estre assigne oustre pur loyal cause come just det, et nemy pur maintenance." WEST, SYMBOLEOGRAPHY, § 521. Cf. Ames, 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, 584, note 2; POLLOCK, CONTRACTS, 5 ed. App. 700–701.

[104] MOYLE, JUSTINIAN, 5 ed., 482–483.

[105] Y. BB. 34 HEN. VI, Mich., pl. 15, 15 HEN. VII, Hil., pl. 3.

[106] *Ibid.*

be proved if it appeared that the assignee had merely purchased the debt from the assignor without any particular reason for so doing.[107] It is true that in 1590, in the case of *Penson* v. *Hickbed*,[108] it seems to have been held that any assignment of a debt, coupled with a power of attorney to sue for it, was valid, unless it was void for champerty. But this case does not seem to have been followed. Right down to the latter part of the seventeenth century it seems to have been held, both by the common-law courts and by the court of Chancery, that, unless the assignor owed money to the assignee and had made the assignment on this ground, the objection of maintenance was fatal. This principle was laid down in 1596[109] by the court of Common Pleas, and by Lord Keeper Bridgman (1667–72) in the court of Chancery.[110]

When this point had been reached it was inevitable that further developments should be made. At the beginning of the eighteenth century it was quite settled that equity would recognise the validity of the assignment both of debts and of other things recognised by the common law as *choses* in action.[111] In other words it would, as the Judicature Act expresses it,[112] recognise the validity of the

[107] Y. B. 37 HEN. VI, Hil., pl. 3 — a case which shows that the common-law courts and the court of Chancery took the same view on this question.

[108] Cro. Eliza. 170 — to the objection that buying of bills of debts was maintenance, the judge said it was not, "for it is usual among merchants to make exchange of money for bills of debt, *et e contra*. And Gawdy said, it is not maintenance to assign a debt with a letter of attorney to sue for it, except it be assigned to be recovered, and the party to have part of it." In the report of the same case in 4 Leo. 99 the objection was taken that though an assignment in satisfaction of a debt due to the assignee was good, this assignment was bad because it did not appear that any such debt was due; for these bills of debt see an article by the present writer, 31 L. QUART. REV. 377–381.

[109] South and Marsh's case, 3 Leo. 234 (1590) — though it can be assigned to the queen, "it cannot be assigned to a subject, if not for a debt due by the assignor to the assignee, for otherwise it is maintenance." Barrow *v.* Gray, Cro. Eliza. 551 (1597); Ames, 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, 584, and authorities there cited.

[110] "The Lord Keeper Bridgman will not protect the assignment of any chose in action, unless in satisfaction of some debt due to the assignee; but not when the debt or, *chose in action* is assigned to one to whom the assignee owes nothing precedent, so that the assignment is voluntary or for money then given." Freeman Ch. Cas. 145. It was probably decisions like these that caused Bridgman to get the reputation of sticking too closely to common-law rules to be a good judge of the court of Chancery. LIVES OF THE NORTHS, 198.

[111] Warmstrey *v.* Tanfield, 1 Ch. Rep. 29 (1628–29); Squib *v.* Wyn, 1 P. Wms. 378, 381 (1717).

[112] 36 & 37 VICT., c. 66, § 25 (6).

assignment of "any debt or other legal chose in action." [113] In equity, therefore, there was no need to show a special relationship between the assignor and the assignee in order to rebut the presumption of maintenance. During the same century the common-law courts, probably in consequence of the attitude of equity, soon adopted the same attitude with respect to the assignment of debts. The objection of maintenance was, it is true, a valid objection, both at law and in equity, if it could be proved; [114] but the courts now took the view that it was absurd to suppose that an assignment *per se* involved a presumption of maintenance.[115] Blackstone makes it quite clear that any such presumption was obsolete when he wrote.[116] But this involved the consequence that it was no longer necessary to look at the relationship between the assignor and the assignee. It was no longer necessary, therefore, that the assignor should be the debtor of the assignee. It followed that a creditor could, by making the assignee his attorney, assign his debt to any one. The appointment of an attorney had come to be a formality — though to the end it was a necessary formality.[117] In this way the common law managed to maintain in theory its doctrine that a *chose* in action was unassignable, while abandoning it in practice in the case of debts. The further inroads upon this theory made by equity and by legislation belong to a later period in the history of the law.

It is fairly clear that the common law was induced to connive

[113] "I think the words 'debt or other legal chose in action' mean 'debt or right which the common law looks on as not assignable by reason of its being a chose in action, but which a Court of Equity deals with as being assignable.' " Torkington *v.* Magee, [1902] 2 K. B. 427, 430–431, per Channell, J.; but the phrase "legal chose in action" is not a very happy one to express "a thing regarded by the common law as a chose in action."

[114] Prosser *v.* Edmonds, 1 Y. & C. (Ex.) 481 (1835); Dawson *v.* Great Northern and City Railway, [1905] 1 K. B. 260, 270–271, per Stirling, L. J.

[115] It would seem from the case of Deering *v.* Farrington, 3 Keb. 304 (1674), that Hale, C. J., was inclined to take this view at this early date. At the end of the eighteenth century Buller, J., could say that, "It is laid down in our old books, that for avoiding maintenance a *chose in action* cannot be assigned; or granted over to another. The good sense of that rule seems to me to be very questionable; and in early as well as modern times it has been so explained away, that it remains at most only an objection to the form of the action in any case." Master *v.* Miller, 4 T. R. 320, 340 (1791).

[116] 2 Comm. 442.

[117] 2 Bl. Comm. 442. *Cf.* Mallory *v.* Lane, Cro. Jac. 342 (1615), where it is recognised that the delivery of statutes merchant without a power of attorney to sue was not an assignment.

at the introduction and extension of this evasion of its principle that a *chose* in action is not assignable by considerations of mercantile convenience or necessity. But this exception only applied to debts; and even equity did not go the length of permitting all contractual rights to be assigned in this manner. Some were too personal in their character to permit of any kind of assignment and others were too uncertain. But these limitations upon the power to assign can be better explained when the rights of action of a purely delictual kind have been dealt with.

(iii) In the common law the sphere occupied by actions in tort is very wide. The actions of replevin and detinue were recognised from the first as being of a mixed proprietary and delictual character;[118] and of the action of trover, which came to be the action generally used by owners who sought to recover their chattels, was at first purely delictual in character, and only gradually acquired proprietary characteristics.[119] With these causes of action in tort which were of a proprietary character I have already dealt. We have seen that, from a comparatively early date there was a tendency to think that the rights of the owner of chattels who was not in possession should be assignable, and that the assignee should be able to sue; but that the fact that the rights of owners of land who were not in possession could not be assigned, and the great importance attached to the prevention of maintenance, prevented the clear recognition of the fact that such rights could be assigned till modern times.[120] On the other hand, no relaxation has ever been suggested in the rule that a right of action for unliquidated damages for a tort to property or to the person is unassignable.[121] Such claims were not debts; they were both too uncertain and too personal to admit of the application to them of the indirect method of assigning debts by the process of making the assignee the attorney of the assignor.[122] Clearly these considerations apply also to certain rights arising out of contract. A contract may stipulate for services

[118] 2 HOLDSWORTH, HISTORY OF ENGLISH LAW, 311; 3 *Ibid.*, 248–249.

[119] *Infra*, 1005–1006.

[120] *Infra*, 1016–1018.

[121] Dawson *v.* Great Northern and City Railway, [1905] 1 K. B. 260, 271, per Stirling, L. J.; *supra*, 1018.

[122] Thus in 1456 Wangford *arg.* said, "Sir jeo entend que un duty de chose que (est) certain poit estre assez bien assigne pur un satisfaction; mes de chose (que) est non certain come en le cas de Trespass jeo grant bien" (*i. e.* that it cannot be assigned); and to this Prisot, C. J., agreed. Y. B. 34 HEN. VI, Mich., pl. 15.

of so personal a character that to allow an assignment of rights under it would be unfair to the contracting parties;[123] or, if a contract has been broken, the amount of damages recoverable may be too uncertain to permit of assignment.[124] But it was not till certain classes of rights recognised as *choses* in action by the common law became more freely assignable in equity that it was necessary to distinguish between the cases in which assignment was permitted and cases in which it was not; and it is for this reason that we find very little clear authority on these questions till quite modern times. Until it became necessary to draw this distinction, authority was hardly needed for the obvious proposition that these *choses* in action were unassignable. As the result of the modern discussions on the limitations of the right to assign, it would seem that, subject to exceptions which modern cases appear to have allowed, either if the assignment of certain of these rights of action in tort is merely incidental to an assignment of property,[125] or if such assignment comes within the scope of the application of the doctrine of subrogation to the rights of insurers,[126] the modern law refuses to allow the assignment of a right to sue in tort for a merely personal wrong, and for damages of uncertain amount; and that it applies the same rule to rights of action arising under contracts.

In laying down these rules the judges have, for the most part unconsciously, followed lines of reasoning which their predecessors followed in solving different, but some analogous problems. From an early date the courts were faced, firstly, with the problem of the extent to which the maxim "action personalis moritur cum persona" interfered with the transmissibility on death of rights and liabilities arising from contract and tort; and secondly, with the problem of the limits of the king's rights to the *choses* in action of an outlaw or a felon. Of the first of these problems I have spoken elsewhere. We have seen that rights of action for unliquidated damages for torts against person or property, and for the breach of contracts which involve personal skill or the continuance

[123] Robson *v.* Drummond, 2 B. & Ad. 303 (1831); Stevens *v.* Benning, 1 K. & J. 168 (1854).

[124] Torkington *v.* Magee, [1902] 2 K. B. 427, 434.

[125] Williams *v.* Protheroe, 5 Bing. 309 (1829); Dawson *v.* Great Northern and City Ry., [1905] 1 K. B. 260, 271.

[126] King *v.* Victoria Insurance Co., [1896] A. C. 250.

of the deceased's personality, were not at common law (apart from statutory modifications) transmissible on death; but that a right to recover property taken by the deceased and added to his estate has always been transmissible.[127] Clearly these rules rest on principles which are based on considerations very similar to those now applied to determine whether or not a *chose* in action is assignable. The second of these problems is indirectly connected with the problem of assignability, but it falls more properly under the following head:

The Relation of these Choses in Action to Other Branches of the Law. — The first of the branches of the law which have helped to elucidate the legal incidents of *choses* in action is the law as to the king's rights to the chattels of persons outlawed or attainted. I shall deal first with this branch of the law; and then more briefly with the other branches of the law which have contributed to this elucidation.

(i) From the earliest days of the common law it had been recognised that the king could assign a *chose* in action.[128] This exceptional rule was no doubt due to the king's extensive rights to forfeiture on an outlawry or on a conviction for treason or felony.[129] Unless the king had been allowed to assign these rights his revenue might have suffered. Moreover, an additional reason based on much the same principle was found in the fact that such a power was essential in order to enable him to deal with debts due to him from his officials,[130] and in order to enable him so to deal with the proceeds of taxes granted to him that they could be made to produce an immediate revenue.[131] It was probably for the same reasons that these rights of the king tended to expand. Not only could the king assign, but the king's grantee was allowed to sue

[127] 3 HOLDSWORTH, HISTORY OF ENGLISH LAW, 455–456, 458.

[128] As Sir F. Pollock points out, before the Jews were expelled the king "claimed and exercised an arbitrary power of confiscating, releasing, assigning or licensing them to assign, the debts due to them." CONTRACTS, 5 ed., App. 699; the Year Books accept the rule as well settled. BROOKE, ABRIDGMENT, *Chose in Action*, pl. 1 = Y. B. 3 HEN. IV, Mich., pl. 34; pl. 6 = Y. B. 2 HEN. VII, Mich., pl. 25.

[129] POLLOCK, *op. cit.*, 699.

[130] See Y. B. 39 HEN. VI, Mich., pl. 36, when it was said that "le comon cours de l'Exchequer est, quand le Roy per ses Lettres done ou grant un duity que est due a luy per ascum, le grantee le Roy de ce det aura bon action a son nom sole, et issint ne puit nul autre faire."

[131] See Y. B. 1 HEN. VII, Hil., pl. 5, where there was a question as to assignments of money in the hands of the collectors of the tithes granted to Richard III.

in his own name;[132] and any one was allowed to assign a *chose* in action to the king.[133]

These exceptional rules were the more necessary because, in some respects, the king's rights over *choses* in action personal were larger than his rights over *choses* in action real. In the case of *choses* in action personal a mere right of action was forfeited to the king; but, in the case of a *choses* in action real, it was decided, doubtless from motives of public policy, that a mere right of action was not forfeited to the crown.[134] But though the rights of the crown to *choses* in action personal were wide, they were not unlimited. It was recognised that there were some rights of action of so personal and so uncertain a character that they would not pass to the king. Thus it was laid down in the reign of Edward III that debts on which the debtor might wage his law could not pass to the king;[135] and in the reign of Edward IV that the same principle was applicable to a right to sue in trespass for damages.[136] But, in the sixteenth century, wager of law was being discouraged and circumvented as far as possible, and the older precedents were not wholly consistent;[137] so that it is not surprising that on grounds of public policy and in accordance with the practice of the Exchequer, it was held in Slade's case that such debts were forfeited.[138] On the other hand, the view prevailed that the right to sue for unliquidated damages for trespass was too uncertain to be forfeited.

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[132] Note 130, *supra*.

[133] Y. B. 21 HEN. VII, Hil., pl. 32.

[134] "Note a diversity between inheritances and chattels; for as it hath been said, a right of action concerning inheritances is not forfeited by attainder, but obligations, statutes, recognisances, etc., and other such things in action are forfeited to the King by attainder or outlawry." Winchester's case, 3 Co. Rep. f. 1, 3a (1538). The reason why "a right of action concerning inheritances" is not forfeited is said to be that "it would be very vexatious and inconvenient, that estates of purchasers and others, after many descents and long possession, should be impeached at the King's suit . . . against the reason and rule of the common law." *Ibid.*, f. 2b. See the King *v.* the Executors of Daccombe, Cro. Jac. 512 (1619), where it was held that a beneficial contract to supply goods to the king held on trust is forfeited on the attainder of the *cestui que trust*.

[135] BROOKE, ABRIDGMENT, *Chose in Action*, pl. 9; 16 EDW. IV, Pasch., pl. 49; Anon., Dyer, 262a (1567).

[136] "Fuit dit que le Roy poet granter son action que est certein, come de det al Roy, mes nemy de trespass fait al Roy, que est non certein." Y. B. 5 EDW. IV, Mich., pl. 22.

[137] FITZHERBERT, ABRIDGMENT, *Corone*, pl. 343 (3 EDW. III).

[138] 4 Co. Rep., ff. 95a, 95b (1602); Bullock *v.* Dodds, 2 B. & Ald. 258, 275–276 (1819), per Abbott, C. J.

We have seen that in 1456 the same test was suggested to determine whether or not a *chose* in action was assignable,[139] and that this is in substance the test applied by the judges at the present day for this purpose.[140]

(ii) At common law all the wife's chattels passed to her husband. But for this purpose a *chose* in action was not a chattel. The husband could reduce it into his possession, but, till he had done so, it was not his; and, if he died without reducing it into his possession it remained the property of the wife.[141] Again, the fact that a *chose* in action was evidenced by a written document did not make it any the less a *chose* in action. Therefore the document being *per se* valueless, could not be the subject of larceny.[142] For somewhat similar reasons neither a *chose* in action nor the document which evidenced it could be seized under a writ of *fieri facias*.[143] The *chose* in action was not a tangible thing which admitted of physical seizure, and the document was not saleable.[144] It is true that by the special customs of London and certain other cities, and by virtue of a writ of execution issued at the suit of the crown, debts owed to a debtor could be attached by a creditor.[145] But it was not till 1854 that this principle was introduced into the common law by the Common Law Procedure Act passed in that year.[146] It was only by virtue of the interpretation put upon the provisions of the Bankruptcy Acts that the *choses* in action of a bankrupt were made available for his creditors;[147] and in this case,

[139] *Supra*, note 57, 122.

[140] *Supra*, 1023. *Cf.* 10 L. QUART. REV. 157.

[141] 3 HOLDSWORTH, HISTORY OF ENGLISH LAW, 410.

[142] *Ibid.*

[143] See *Ex parte* Foss, 2 De G. & J. 230, 237 (1858), per Knight-Bruce, L. J.; Colonial Bank *v.* Whinney, 11 A. C. 426, 439 (1886), per Lord Blackburn.

[144] Francis *v.* Nash, Case t. Hard. 48 (1734).

[145] 1 HOLDSWORTH, HISTORY OF ENGLISH LAW, 105–106, 312.

[146] "We are not aware of any process either in the superior courts of law or equity, in suits between subject and subject, by which this can directly be done, though the course of proceeding under writs of execution at the suit of the crown, and by way of foreign attachment in the Mayor's Court of London and some other cities, as well as in the courts of many foreign countries, shows that such a remedy would be practical and useful. . . . We recommend that a creditor, having obtained a judgment, should be allowed to proceed, by a process similar to foreign attachment, against the debtors of his debtor." Second Report of the commission to enquire into the Process Practice and System of Pleading of the Courts of Common Law, Parlt. Papers xl 740 (1852–53); 17 & 18 VICT., c. 125, § § 60–67.

[147] See 10 L. QUART. REV. 316, note 4.

as in the case of assignability, we must make an exception in the case of rights which arise from causes of action of a purely personal character.[148]

It is clear from these illustrations that the law started from the idea that a *chose* in action is a personal non-assignable right. But, having found that a rigid adherence to the theory is in practice inconvenient and impossible, it has partially modified it in many different directions; and these modifications have been carried further both by equity and by the legislature. The result is that, though very little is left of the broad principle from which the law started, it is necessary to know it, because it is still operative unless it has been modified by the common law, by equity or by statute. We shall now see that the difficulties arising from these causes have been increased by the further modifications which have necessarily been made in those other classes of *choses* in action which, as we have seen,[149] emerged during the seventeenth and eighteenth centuries.

(2) *The Legal Incidents of the Later Varieties of Choses in Action*

The later varieties of *choses* in action all differ from the original class of *choses* in action in that they are assignable. Negotiable instruments were assignable by the law merchant. Stocks and shares were in early days expressly made assignable by charter or Act of Parliament.[150] Patent rights were by their terms always assignable.[151] Copyright, whether it depended upon the rules of the Stationers Company and the Licensing Acts, or upon royal grant, was always assignable, and when it came to be dependent on the terms of the Act of 1709 it was assignable by the express provisions of the Act.[152]

In respect, however, to some of the other legal incidents of these *choses* in action the law is not so clear or certain. Thus, at the beginning of the nineteenth century it was a very doubtful question how, if at all, a husband could reduce into possession stock belong-

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[148] Beckham *v.* Drake, 2 H. L. Cas. 579, 626–628 (1847), per Parke, B.

[149] *Supra*, 1013.

[150] *Supra*, note 65.

[151] WILLIAMS, PERSONAL PROPERTY, 17 ed., 43.

[152] 8 ANNE, c. 19, § 1.

ing to his wife. "It is obvious that if stock were a chose in action of the same nature as a debt or claim to goods, it could never be reduced into possession unless the government voluntarily redeemed it."[153] It was ultimately held that, if the husband got a transfer of the stock into his own name, he had reduced it into his possession.[154] What would amount to the reduction into possession of such *choses* in action as a copyright or a patent right does not seem to have been absolutely settled;[155] and the question is now of course academic. The rule that *choses* in action were not capable of being stolen has produced much legislation to take certain classes of *choses* in action out of this rule. Thus a statute of 1729[156] made it felony to steal "Exchequer orders or tallies or other orders entitling any other person or persons to any annuity or share in the parliamentary fund, or any Exchequer bills, South Sea Bonds, Bank notes, East India bonds, dividend warrants of the Bank, South Sea Company, East India Company, or any other company, society, or corporation."

In order to remedy the difficulty that these *choses* in action could not be taken in execution under a writ of *fieri facias*, the Judgments Act of 1838[157] enabled the sheriff to seize money, bank notes, cheques, bills of exchange, promissory notes, bonds, specialties, or other securities of money. But clearly this did not enable all classes of *choses* in action to be seized to satisfy a judgment debt. In some cases equity intervened to remedy the hardship occasioned by the difficulty of realising a claim. Thus, by means of the appointment of a receiver it permitted a species of equitable execution.[158] But even this device is not wholly adequate, nor are the limits within which it is available wholly clear. In 1909, in the case of *Edwards* v. *Picard*, the question whether a receiver could be appointed of the receipts of the profits of certain patents, when it was not shown that the debtor was actually in receipt of any profits, divided the court of appeal.[159] Similarly the application of

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[153] 10 L. QUART. REV. 313.

[154] *Ibid.*

[155] 11 *Ibid.*, 236, 238–239.

[156] 2 GEORGE II, c. 25, cited 10 L. QUART. REV. 312–313; 3 STEPHENS, HISTORY OF THE CRIMINAL LAW, 144, 148.

[157] 1, 2 VICT., c. 110.

[158] See generally, 14 HALSBURY, LAWS OF ENGLAND, 115 *seqq.*

[159] [1909] 2 K. B. 903.

the Bankruptcy Laws to some of these *choses* in action has raised some very nice problems — largely because the draftsmen of these Acts have used the term "*chose* in action" without appreciating the fact that it covers a miscellaneous mass of very different things which have or should have very different legal incidents.[160] Thus in 1885, in the case of *Colonial Bank* v. *Whinney* [161] the question whether shares were taken out of the reputed ownership clause of the Bankruptcy Act of 1883 by the proviso in that clause excluding *choses* in action, also divided the court of appeal.

It is thus apparent that the modern English law as to *choses* in action can hardly be called satisfactory; and this history shows that its unsatisfactory character is due mainly to the following causes: Firstly, the enormous extension given to the term has included in this category a very large number of things of very different kinds. Rules which were made for *choses* in action, when the term meant literally rights of action against some person, are obviously inapplicable to proprietary rights of an incorporeal nature; but it is clear that these rules must be applied to these rights because they are *choses* in action, unless some authority — legislative or otherwise — can be produced which shows that they are subject to some other rule. Secondly, even in the case of some of the original class of *choses* in action, the old rule of non-assignability has been gradually modified; and in this work of gradual modification both law and equity have lent a hand. The result has been that some of these *choses* in action have changed their original character, and become very much less like merely personal rights of action and very much more like rights of property. But this process has been retarded and the whole question obscured by the distorting influence of the fear of encouraging maintenance. Owing to the disorderly state of the country in the fifteenth and early sixteenth centuries this fear rightly exercised a large effect upon this branch of the law; but unfortunately its effect lasted long after the cause for it had been removed. The result has been that the development of the law was slow, and the slowness of the modification of the original conception of a *chose* in action as a personal unassignable thing has caused a long continued uncertainty in the modern law. Thirdly, a further source of complication has

[160] 11 L. QUART. REV. 240.

[161] 30 Ch. D. 261 (1885).

been added by the piecemeal exceptions introduced by the legislature to the general rules applicable to *choses* in action in favour of some or all of them. It is sometimes difficult to ascertain the sense in which the legislature has used the term "*chose* in action" — we have seen that the Bankruptcy Act affords one illustration;[162] and, as we can see from the case of *Edwards* v. *Picard*,[163] the modifications introduced by the courts have sometimes occasioned a similar difficulty. Some of these difficulties might be perhaps mitigated by a codifying Act, for which there is plenty of material. But it is probable that a branch of the law which comes at the meeting place of the law of property and the law of obligation can never be anything but difficult to formulate and apply.

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[162] Colonial Bank *v.* Whinney, 30 Ch. D. 261 (1885).
[163] [1909] 2 K. B. 903.